

## **APPENDIX I**

*Millennium Lab Holdings II, Hr'g Tr., dated December 15, 2015 [Case No. 15-12284-LSS]*

1 findings to support the conclusions.

2 Since 2000, this Court and others within this  
3 jurisdiction have approved plans containing third-party  
4 releases, when appropriate, under the Continental hallmarks.  
5 Voya has cited no cases within this jurisdiction which have  
6 found, as a matter of law, that third-party releases are, per  
7 se, impermissible. I will not reach out to other circuits to  
8 adopt such a position.

9 In analyzing whether the Continental hallmarks are  
10 satisfied, some courts within this circuit considered the  
11 factors announced by the Master Mortgage Court, discussed in  
12 Continental and adopted by Zenith, with respect to debtor  
13 releases. These factors are:

14 An identity of interest between the debtor and the  
15 third party, such that a suit against the debtor is, in  
16 essence, a suit against the -- a suit against the non-debtor  
17 is, in essence, a suit against the debtor, or will deplete  
18 assets of the estate.

19 Substantial contribution by the non-debtor of assets  
20 to the reorganization.

21 The essential nature of the injunction to the  
22 reorganization, to the extent that, without the injunction,  
23 there is little likelihood of success.

24 An agreement by a substantial majority of creditors to  
25 support the injunction; specifically, if the impacted class or

1       classes overwhelmingly votes to accept the plan.

2                   And a provision in the plan for payment of all or  
3       substantially all of the claims of the classes -- class or  
4       classes affected by the injunction.

5                   Looking at the factors in order, first I find that  
6       there is an identity of interest between the debtors and the  
7       third parties, including those in the Voya complaint, because  
8       of the indemnifications and advancement obligations discussed  
9       above. Any litigation claims brought against the released  
10      parties will result in claims being brought for indemnification  
11      and advancements, or certainly conceivably could. While such  
12      claims will not reduce the recoveries of those creditors  
13      receiving 100 cents on the dollar, such claims will reduce  
14      recoveries for Class 2, the prepetition lenders, because they  
15      take equity.

16                  Further, I find that the released parties, including  
17      TA, MLH, the U.S.A. settlement parties, the participating  
18      lenders, and the D's and O's, all share a common goal of  
19      confirming and implementing the plan, which contains settlement  
20      of contested and costly litigation. These goals include:  
21      Right-sizing the reorganized debtors' balance sheet, avoiding  
22      complex litigation costs and delay, maximizing the debtors'  
23      value for all concerned.

24                  This finding supports the conclusion that there is an  
25      identity of interests between the debtors and the released

1 parties. And I would cite Tribune, 464, at 187; and Quorum  
2 (phonetic), 315, at 335.

3 As to the second factor, I find that there is a  
4 substantial contribution by the non-debtor parties of assets to  
5 the reorganization.

6 First, as to TA and MLH, if this plan is confirmed, TA  
7 will contribute 146 and a quarter million dollars to the  
8 debtors. MLH will contribute 178 and three-quarters million  
9 dollars to the debtors. There is an indication that each of  
10 the shareholders in MLH, James Slattery, Howard Appel, David  
11 Cohen, Greg Stein, Sunshine Alexis Stein, Marvin Retsky, and  
12 Murray Rosenthal, are paying their proportionate contribution  
13 of this amount. Each of TA and MLH are relinquishing their  
14 equity interest in the debtors consensually. Each of TA and  
15 MLH are releasing claims against the debtors.

16 As to TA and MLH, I find that this contribution is  
17 substantial and real. I also find, on the facts of this case,  
18 that the contribution made by TA and MLH and each individual  
19 shareholder, which settles claims against them, based on the  
20 2014 recapitalization transaction, is made on behalf of  
21 themselves and their "related parties," as that term is used in  
22 the plan. Each of these corporate families must be protected,  
23 in order for TA and MLH to buy peace in this litigation.

24 As to the prepetition lenders, they have made  
25 substantial contributions by relinquishing their existing

1 credit agreement claims and other potential claims against the  
2 related parties, entering into the restructuring support  
3 agreement, and voting in favor of the plan. Because of this  
4 workout, other creditors are receiving 100 cents on the dollar.

5 As the liquidation analysis attached to the disclosure  
6 statement indicates, in a liquidating plan, the unsecured  
7 creditors receive no distribution. Thus, I find this  
8 contribution to be substantial on the facts of this case.

9 As to the directors and officers, this is a closer  
10 call. Mr. Hardaway testified in his declaration that the  
11 directors and officer made, quote:

12 " -- unique and substantial commitments of time and  
13 effort to bring this global settlement before the  
14 Court for confirmation."

15 Mr. Hardaway also testified in his declaration, that,  
16 quote:

17 "Debtors' management will continue to work in their  
18 present roles for the reorganized debtors, and as  
19 such, make indispensable contributions to the  
20 successful reorganization of debtors."

21 On the one hand, some of my colleagues have ruled on  
22 numerous occasions that sweat equity is not sufficient  
23 consideration for a release. On the other hand, there are  
24 cases cited by the debtors for the proposition that continued  
25 service is a substantial asset to the reorganization.

1                   I am not rejecting the argument that sweat equity  
2 alone may not be sufficient to constitute a substantial  
3 contribution in a given case. But in this case, where the  
4 record is unrebutted that the efforts of management  
5 successfully resulted in a viable plan that garnered support  
6 from all parties other than Voya, and results in 100 percent  
7 payment to all creditors other than the prepetition lenders;  
8 and that management, in the prepetition lenders' view, is  
9 critical to unlocking the reorganized debtors' total enterprise  
10 value, I find that the directors and officers have made a  
11 substantial contribution.

12                  The third factor is the essential nature of the  
13 releases and injunctions to the reorganization to the extent  
14 that, without the releases and/or injunction, there is little  
15 likelihood of success.

16                  While there was some debate about whether this factor  
17 requires that the releases are a prerequisite to obtaining the  
18 funding for the plan, or whether the releases themselves are a  
19 necessary component of the plan, I find this factor is  
20 satisfied, regardless of the interpretation.

21                  Here, the unrefuted evidence is that that third-party  
22 releases, all of them, even those who may not have made a  
23 substantial contribution to the reorganization in the classic  
24 sense, was required to obtain the funding for this plan.

25                  The declarations of Mr. Kurtz and Mr. Aloise were

1 clear, and there may have been others supporting this, as well.

2 And I will quote from Mr. Kurtz's declaration at Paragraph 14:

3 "The third-party releases and related provisions in  
4 the RSA and plan, disputed by Voya, were heavily  
5 negotiated among the debtors, the equity holders, and  
6 the ad hoc group. The releases in particular were  
7 specifically demanded by the equity holders as a  
8 condition to making the contribution reflected in the  
9 plan, and demanded by the other released parties, in  
10 exchange for their contributions to and support for  
11 the plan and reorganization.

12 "I believe" -- that's Mr. Kurtz -- "the releases and  
13 related provisions were necessary to induce the equity  
14 holders to make the three-hundred-and-twenty-five-  
15 million-dollar settlement contribution that serves as  
16 a critical element of the reorganization plan.

17 Moreover the equity holder settlement contribution was  
18 necessary to induce the ad hoc group's support of the  
19 RSA and the plan.

20 "I believe that, based on my personal involvement in  
21 the negotiations with the various parties-in-interest,  
22 without the third-party releases provided by the  
23 prepetition lenders, as set forth in the plan" -- no,  
24 that's -- "without the third-party releases, there  
25 will be no cash contribution available to fund the

1                   government settlements. Further, absent consummating  
2                   the U.S.A. settlement in accordance with the terms of  
3                   the plan, the company will liquidate and all going  
4                   concern value will be lost."

5                   Thus, it is clear that the releases are necessary to  
6                   both obtaining the funding and consummating a plan. In these  
7                   cases, the funding does not merely enhance creditor recoveries;  
8                   it is necessary for the debtor to confirm the plan.

9                   The fourth factor. The fourth factor is whether the  
10                  substantial majority of creditors support the releases, and  
11                  whether, in particular, the impacted class overwhelmingly votes  
12                  to accept the plan.

13                  This factor is easily satisfied as to Class 2,  
14                  existing credit agreement claims. As evidenced by the  
15                  declaration of James Daloia of Prime Clerk, LLC, the tabulator  
16                  of votes on the plan, Class 2 accepted its treatment under the  
17                  plan by 93.02 percent in number and 93.74 percent in amount.

18                  The fifth factor. The fifth factor is whether the  
19                  plan provides for the payment of all or substantially all of  
20                  the claims of Class 2. As interpreted by Judge Carey in  
21                  Tribune, the standard is whether the nonconsenting creditors  
22                  receive reasonable compensation in exchange for the release.

23                  The evidence is that Class 2 will receive a six-  
24                  hundred-million-dollar new term loan, all of the equity  
25                  interest in the reorganization, and recoveries under the two

1       trusts that are formed under the plan, as well as perhaps suit  
2       against excluded parties.

3                   Mr. Kurtz has estimated the total enterprise value of  
4       the reorganized debtors is in excess of \$900 million, on a  
5       going concern, pro forma, reorganized basis. His valuation  
6       assumes that the plan is confirmed and goes effective by  
7       December 31st. His valuation also assumes that present senior  
8       management will continue in their current positions. There was  
9       no challenge to this valuation.

10          I find the value to be received by Class 2 creditors  
11       to be reasonable compensation for this release, as did over 90  
12       percent of the prepetition lenders. In particular, in the  
13       event of a liquidation of the debtors, and as reflected in the  
14       disclosure statement and unchallenged by any party, the  
15       prepetition lenders would receive between one percent and five  
16       percent, and general unsecured creditors would receive nothing  
17       in a liquidation. Therefore, I find the fifth factor is  
18       satisfied.

19          Having walked through the factors, which courts  
20       examine, I return to the Continental hallmarks of appropriate  
21       third-party releases and injunctions: Fairness and necessity  
22       to the reorganization. Taking into consideration the facts of  
23       this case, I find the releases and injunctions to all parties  
24       to be fair and necessary to the reorganization.

25          To only summarize, but not replace the above findings

1 and rulings, I find significant to my decision that:

2 One, the contributions made by MLH and TA are  
3 absolutely essential to the reorganization of this debtor.

4 Without the contributions, there is no reorganization. While  
5 Voya would have me speculate as to other options, I do not see  
6 one. CMS will revoke the debtors' license, and there will be  
7 no ongoing business if payment is not made to the U.S.A.  
8 settlement parties by December 30th.

9 Two, there is an enormous disparity between the  
10 reorganization value and the liquidation value of this company.  
11 So the contributions facilitate distributions to creditors --  
12 not only facilitate distribution to creditors, including those  
13 in Class 2, but those -- again, those distributions are  
14 enormously greater in a reorganization, versus a liquidation.

15 The prepetition lenders are subordinating their claims  
16 to permit unsecureds to receive a 100 percent recovery.  
17 Without this settlement, this case turns into litigation.  
18 Inherent in that litigation is the uncertainty of success,  
19 expenses and delay in obtaining recoveries. Over 90 percent of  
20 the creditors prefer recoveries from an ongoing business.

21 All parties were at the table in the negotiation in  
22 this settlement contained in a plan. This is not a situation  
23 of entrenched management forcing recoveries upon unwilling  
24 creditors, and seeking a release in connection with that.

25 There was no objection to the settlement, even by

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1 the third party releases. Are we to alter any of the  
2 parties that are included in the third party releases?

3 THE COURT: No.

4 MR. HALL: Thank you, Your Honor. Appreciate it.

5 THE COURT: Okay. Is there anything else for  
6 today?

7 MS. GOOD: No, Your Honor, nothing else for today.  
8 Thank you for your ruling. We will incorporate those  
9 changes, file the further amended plan and the confirmation  
10 order under certification of counsel and have that  
11 (indiscernible)...

12 THE COURT: Okay, thank you. I appreciate the  
13 extremely well-briefed and argued issues that were before me  
14 today. It's great. Very helpful to the Court. So, I  
15 appreciate it all. And with that, I wish everybody a good  
16 day and we are adjourned.

17 MS. GOOD: Thank you, Your Honor.

18 MR. HALL: Thank you, Your Honor.

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*In re TK Holdings Inc.*, Hr'g Tr., dated February 16, 2018 [Case No. 17-11375-BLS]

1 is an extraordinary case.

2                   And so when I look at the five factors, again, I  
3 will address them in summary form, and I note and rely upon  
4 the evidence that was submitted, particularly, Mr. Bowling's  
5 declaration laying out the factors. But, nevertheless, for  
6 purposes of completeness of the record, courts have  
7 considered whether is there an identity of interest.

8                   The Court has spent a great deal of time over the  
9 past six or seven months, dealing with these proceedings and  
10 identifying matters where there are indemnification  
11 obligations that are running in every possible direction; in  
12 addition, many, if not all of the release parties, including  
13 officer and directors of the debtor entities, are parties  
14 that would have meaningful indemnification rights.

15                  So, the fact of the matter is, as the Court noted  
16 in the injunction litigation, litigation against the debtor  
17 is often litigation against multiple parties. And litigation  
18 against the OEMs or other parties is effectively litigation  
19 against the debtors. I am satisfied that the identity of  
20 interest prong has been satisfied.

21                  Second, the question of substantial contribution.  
22 Again, I don't think there is any meaningful dispute that  
23 there is, in fact, substantial contribution being provided by  
24 each of the parties. The OEMs have provided for the  
25 restitution of substantial claims in support of the debtors

*In re Tritek International, Inc. et al.*, Hr'g Tr., dated October 5, 2023 [Case No. 23-10520-TMH]

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1                   THE COURT: Okay. I want to take a few moments to  
2 gather my notes and why don't we come back on the record at  
3 1:15, unless the parties would like a longer break to go to  
4 lunch or anything of that sort.

5                   MR. HALL: From our perspective, Your Honor, we  
6 defer the Court.

7                   THE COURT: Yeah, okay. Well, let's push it  
8 through then. We'll recess until 1:15.

9                   (Recess)

10                  THE COURT: Okay, I'm prepared to rule on the  
11 plan. I want to start by noting that I appreciate the work  
12 of the parties and the cooperation that went into it to  
13 narrow the issues and come to resolutions on many important  
14 issues. And I note that when the plan was solicited, the  
15 committee had a statement that said that they urged the  
16 creditors to vote against the plan. And I think it's really  
17 significant that the committee is here today supporting the  
18 plan. And through the work of the parties, the projected  
19 recoveries to unsecured creditors have increased meaningfully.  
20 The projections have increased meaningfully. So, I  
21 appreciate that.

22                  I'm going to grant final approval of the  
23 disclosure statement, and I am going to confirm the fourth-  
24 amended plan. The opt out versus opt in issue and the  
25 question of what constitutes consent are questions that, as

1 we know, are not uncontroversial. But, in my view, if a  
2 party receives notice of proposed releases and doesn't  
3 object, that party has consented to the releases. As in  
4 many other respects, when it comes to bankruptcy, parties  
5 are required to be vigilant and defend their rights, and  
6 such is the case here. In this case, I find that the opt  
7 out, it was conspicuous and some creditors did opt out,  
8 which evidences to me that the procedures were effective.

9                 The UST raises a number of concerns that I take  
10 very seriously and I'm grateful for the outstanding argument  
11 from the UST and appreciate the positions that the office  
12 takes. The UST raises concerns about the possibility of  
13 mail errors preventing parties from receiving notice. But I  
14 note that the federal rules of bankruptcy procedure and  
15 civil procedure call for mail notice, and there is a  
16 rebuttal presumption of receipt when a piece of mail is sent  
17 to an addressee. And I think it's the system that we have  
18 and it's the one that we have to live with.

19                 As for unimpaired creditors, the evidence before  
20 me shows that they received notice identifying the release  
21 provisions of the plan, directing them on how to receive  
22 copies of the full plan if they wished, free of cost, and  
23 identified procedures for objecting to being a releasing  
24 party. And I find this to be adequate and also find that  
25 any unimpaired creditor who received such notice and did not

1 object has consented to the release that they are granting.

2 I find the scope of the third party releases to  
3 generally be appropriate but I raise an issue about third  
4 party releases only extending to unknown claims, and I  
5 believe it should extend to known claims as well.

6 Also, to the extent there are parties receiving  
7 releases that are, in effect, illusory because they already  
8 benefit from exculpation, or in the case of a liquidating  
9 trustee, there can be no pre-effective date claims to  
10 release, the drafting may be overzealous. And I won't fault  
11 anybody for that, but there is no harm.

12 So, on those grounds, I am confirming the plan.  
13 There is the one revision I identified and I think there may  
14 be others coming, but I would ask the parties to submit the  
15 -- well, to file a further amended plan if that's what we're  
16 doing and also to submit the proposed form of order as  
17 revised under certification of counsel so that it appears on  
18 the docket. And I have had a chance to review it and I will  
19 enter the order. But, again, I do want to emphasize my  
20 appreciation to the Office of the United States Trustee for  
21 their argument. It is a very important issue and one that I  
22 take very, very seriously. And I think it's my first time  
23 ruling on the issue.

24 MR. HALL: Your Honor, if I may, just to make sure  
25 I understand? We will add known in addition to unknown in

1 the third party releases. Are we to alter any of the  
2 parties that are included in the third party releases?

3 THE COURT: No.

4 MR. HALL: Thank you, Your Honor. Appreciate it.

5 THE COURT: Okay. Is there anything else for  
6 today?

7 MS. GOOD: No, Your Honor, nothing else for today.  
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15 appreciate it all. And with that, I wish everybody a good  
16 day and we are adjourned.

17 MS. GOOD: Thank you, Your Honor.

18 MR. HALL: Thank you, Your Honor.

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